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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Mono)

EDGAR WARD JONES, Plaintiff and Appellant, v. WHISKEY CREEK RESTAURANTS, INC., Defendant and Respondent.	C075030 (Super. Ct. No. CV110051)

Shortly after unknown individuals removed a snow grate in front of a door at Whiskey Creek Restaurant in Mammoth Lakes (the restaurant), plaintiff Edgar Ward Jones walked out the door and fell through the opening in the deck. Jones sued defendant Whiskey Creek Restaurants, Inc. (the owner) for negligence and premises liability. Greg Alexander was the sole shareholder of the owner.

The owner moved for summary judgment, arguing there was no evidence it breached any duty of care owed to Jones or that any breach proximately caused injury

to him. The trial court granted the motion, finding that video evidence showed the snow grate was removed 9 to 10 seconds before Jones fell through the opening, giving the owner insufficient time to protect Jones. The trial court also explained that foreseeability is a crucial factor in determining the scope of the duty of care. Because there was no evidence the snow grate had ever been removed by third parties before, the trial court held the removal of the grate was not sufficiently foreseeable to impose a duty on the owner to take additional preventative measures.

Jones now contends (1) the owner had a duty to control third-party misconduct by assigning a security guard to monitor the deck and by locking the snow grate; (2) the trial court erred in finding good cause to hear the summary judgment motion within 30 days of trial, and Jones had insufficient time to oppose the motion; and (3) the trial court erred in sustaining the owner's objection to a particular paragraph in an expert declaration presented by Jones.

We conclude (1) Jones does not raise a triable issue regarding the owner's duty to take additional preventative measures because Jones cannot show the removal of the snow grate was reasonably foreseeable; (2) the trial court did not abuse its discretion, and substantial evidence supports the trial court's findings of good cause to hear the motion within 30 days of trial and that Jones did not suffer prejudice; and (3) Jones fails to demonstrate that the challenged evidentiary ruling resulted in a miscarriage of justice.

We will affirm the judgment.

BACKGROUND

The restaurant had one public entrance and exit. Stairs and a wood deck led to the public door, and people regularly congregated on the deck.

There was a snow grate on the deck immediately in front of the public door. Snow grates serve a beneficial purpose, allowing persons to remove snow and ice from their shoes before entering a building. The snow grate was 57 inches by 37 inches in size, was very heavy, and was very difficult to move.

On the night of the incident, Jones was at the restaurant with his wife and friends. The snow grate was in place when Jones entered the premises. Later, as he exited the public door, Jones turned to look for his wife and fell into the opening in the deck. He did not see the opening in the deck before he fell and did not look for the snow grate.

Jones did not know who removed the snow grate. He reported the incident to restaurant manager Allison Brookings shortly after he fell. Brookings did not see the removal of the snow grate and did not see Jones fall. The restaurant also had three security guards on duty that evening, but there is no evidence any security guard saw what happened before or during the fall.

Nevertheless, the restaurant also had a security camera directed at its public door and the surrounding deck. The camera recorded what happened in real time or close to real time, and a copy of a portion of the security video is part of the record on appeal. The security video showed that individuals who had congregated near the public door were the ones who removed the snow grate, exposing the opening in the deck. Approximately nine and a third seconds after the grate was removed, Jones took a step out the public door and fell into the opening.

The restaurant said Jones fell around midnight on May 30, 2009, but Jones said the time of the fall was not clear. The security video in the record does not indicate the time.

The Mono County Sheriff's Department conducted a "bar check" at the restaurant at 11:42 p.m. A bar check is a "walk through" of the premises. The local police routinely went to the restaurant for bar checks. An officer entering and exiting the restaurant would necessarily traverse the snow grate. The disposition for the 11:42 p.m. bar check was "OK."

Alexander and Brookings did not know about the snow grate removal until the fall was reported. They watched the security video but did not recognize the individuals who removed the snow grate. Alexander and Brookings had never previously seen anyone

move or remove any snow grate at the restaurant; Alexander never altered the snow grate in front of the public door and never caused any alterations to it.

The owner did not own the land or the building where the restaurant was located. Jones was the managing partner of the limited partnerships that co-owned the building and real property on which the restaurant was located from approximately 2003 to 2005. During that time, Jones and his limited partnerships did not install a locking mechanism for the snow grate or advise Alexander of the need to do so. Jones had been to the restaurant approximately 70 times before the incident. He had never seen the snow grate removed or dislodged except on the date of his fall.

Jones filed a complaint against the owner asserting causes of action for negligence and premises liability. The complaint alleged the owner had a duty to control its business premises to avoid harm to patrons, but the owner breached that duty. The complaint alleged it was reasonably foreseeable that acts of vandalism, pranks, or malicious mischief would occur on the premises unless the premises were reasonably secured because there was a history of such misconduct about the premises.

The owner moved for summary judgment or, in the alternative, summary adjudication, arguing the fall was unforeseeable and no reasonable measures by the owner would have prevented it because ten seconds or less elapsed between the third-party misconduct and the fall.

Jones opposed the motion, arguing insufficient notice (which we discuss in Part II) and also asserting that as a restaurant and bar operator, the owner owed a duty to protect its patrons from reasonably foreseeable third-party misconduct. According to Jones, the third-party misconduct in this case was reasonably foreseeable because removal of the snow grate was similar to crimes that had previously occurred at the restaurant. Jones argued the owner could have taken minimally burdensome steps to avert the fall, such as assigning a security guard to the deck to monitor people congregated there, and locking the snow grate to prevent drunken patrons from removing it.

Jones submitted the declaration of Mammoth Lakes Police Department Administrative Sergeant Marc Moscowitz. Sergeant Moscowitz said he responded to numerous incidents at the restaurant. He said people regularly congregated on the deck and stairs of the restaurant, and he observed vandalism, smoking within 20 feet of the entrance, intoxication, fighting, and loitering at unspecified times. He said the Mammoth Lakes Police Department often stationed one or two officers in vehicles in the restaurant parking lot and at other bars near closing time or when crowds were large or disorderly to prevent criminal activity. Sergeant Moscowitz authenticated Exhibit A to his declaration, a document containing a list of crimes that allegedly occurred at the restaurant for which police reports were prepared during the period July 25, 2003, through March 29, 2013, as shown in data bases maintained by the Mammoth Lakes Police Department. The trial court sustained the owner's objection to evidence of events after the fall.

Jones also presented the declaration of Gerry LaFramboise, a general contractor with substantial experience in construction in the Mammoth Lakes area. In the declaration LaFramboise said he was familiar with the design and construction of the snow grates that were sometimes installed in front of buildings, and he opined, based on his experience, that a locking mechanism could be installed on a five foot by three foot snow grate at a cost of $75. The owner objected to LaFramboise's opinion about installing a locking mechanism on snow grates, and the trial court sustained the objection. Jones now challenges the trial court's ruling regarding the LaFramboise opinion, but he does not challenge any other evidentiary ruling.

Jones also submitted the declaration of Michael Cook, who said he was the victim of an assault at the restaurant in or about 2006. In addition, Jones submitted the declaration of Tyson Kaylor, who said he witnessed a fight at the restaurant deck in approximately 2006 and had seen people sneak drinks outside, pass out on the deck, and engage in verbal altercations at unspecified times. The trial court sustained the owner's objections to both declarations.

The trial court concluded the removal of the snow grate by third persons was not sufficiently foreseeable to impose a duty on the owner, finding that Sheriff's deputies who walked through the premises determined everything was okay shortly before the fall, no employee of the owner saw the removal of the grate, Jones fell through the opening nine to ten seconds after unknown individuals removed the grate, and there was no evidence the grate had previously been removed by third parties. The trial court said none of the prior and subsequent incidents at the restaurant were sufficiently similar to the removal of the snow grate so as to put the owner on notice that the grate should have been secured or that other preventative measures should have been taken. The trial court said imposing further duties upon the owner would be contrary to the established policy that business proprietors should not become the insurers of public safety. The trial court granted judgment in favor of the owner and against Jones.

STANDARD OF REVIEW

A defendant moving for summary judgment may demonstrate that the plaintiff's cause of action has no merit and the defendant is entitled to judgment as a matter of law by showing that the plaintiff cannot establish one or more elements of the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142, 1151 (*Wiener*).) This showing must be supported by evidence, such as affidavits, declarations, admissions, interrogatory answers, depositions, and matters of which judicial notice may be taken. (Code Civ. Proc., § 437c, subd. (b)(1); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 855 (*Aguilar*).)

After the defendant meets its threshold burden, the burden shifts to the plaintiff to present evidence showing that a triable issue of one or more material facts exists as to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra,* 25 Cal.4th at p. 850.) The plaintiff may not simply rely on the allegations of his or her complaint but, instead, must set forth the specific facts showing the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).) A triable issue of material fact

exists if, and only if, the evidence reasonably permits the trier of fact to find the contested fact in favor of the plaintiff in accordance with the applicable standard of proof. (*Aguilar, supra*, 25 Cal.4th at p. 850.)

In ruling on the motion, the trial court views the evidence and inferences therefrom in the light most favorable to the opposing party. (*Aguilar, supra*, 25 Cal.4th at p. 843; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 (*Saelzler*).) If the trial court concludes the evidence or inferences raise a triable issue of material fact, it must deny the motion. (*Ibid*.) The trial court must grant the motion if the papers show there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)

We review an order granting summary judgment de novo. (*Aguilar, supra*, 25 Cal.4th at p. 860.) We independently examine the record that was before the trial court to determine whether a triable issue of material fact exists, liberally construing the evidence and resolving all doubts concerning the evidence in favor of the party opposing summary judgment. (*Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 499-500; *Saelzler, supra*, 25 Cal.4th at p. 767.) We consider all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. (*Wilson v. 21st Century Ins. Co*. (2007) 42 Cal.4th 713, 717; *Gin v. Pennsylvania Life Ins. Co*. (2005) 134 Cal.App.4th 939, 946.) The trial court's stated reasons for granting summary judgment are not binding on us because we review its ruling, not its rationale. (*Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 336.)

DISCUSSION

I

Jones contends the owner had a duty to control third-party misconduct by assigning a security guard to monitor the deck and by locking the snow grate.

Jones claims the misconduct was foreseeable and the preventative measures are not burdensome.

The existence of a legal duty owed to the plaintiff by the defendant is a necessary element of the causes of action Jones alleges. (*Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1369.) It is settled in California that business proprietors, such as restaurant and bar owners (because they stand in a special relationship with their patrons and invitees), owe a duty to their patrons and invitees to maintain their premises in a reasonably safe condition. (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 229, 235 (*Delgado*).) That duty includes the obligation to take " 'reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures.' " (*Id.* at p. 235, italics omitted.) A proprietor's duty " 'to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated.' " (*Wiener, supra*, 32 Cal.4th at p. 1146; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 676 (*Ann M.*), disapproved on another ground in *Reid v. Google, Inc*. (2010) 50 Cal.4th 512, 527, fn. 5.)

The scope of the duty a proprietor owes to patrons and invitees is determined in part by balancing the foreseeability of the wrongful acts by third parties against the burdensomeness, vagueness, and efficacy of the proposed preventative measures.[1]

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[1] Other factors, which may dictate against expanding the scope of a proprietor's duty to include protecting against third-party crime, even where there is sufficient evidence of foreseeability, are: the degree of certainty that the plaintiff suffered injury; the closeness of the connection between the defendant's conduct and the injury suffered; the moral blame attached to the defendant's conduct; the policy of preventing future harm; the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach; and the availability, cost, and prevalence of insurance for the risk involved. (*Delgado, supra*, 36 Cal.4th at p. 237, fn. 15.) Together with the foreseeability of the harm to the plaintiff, the above factors are referred to as the *Rowland* factors, after the seminal case *Rowland v. Christian* (1968)

(*Delgado, supra*, 36 Cal.4th at pp. 237-238.) The California Supreme Court describes a "sliding-scale balancing formula." (*Id.* at pp. 237-238, 243.) A heightened degree of foreseeability -- shown by prior similar criminal incidents or other indications of a reasonably foreseeable risk of the type of conduct at issue in that location -- is required where the burden of preventing future harm caused by third party conduct is great or onerous. (*Id.* at pp. 237-238, 243 and fn. 24.) The Supreme Court cautioned that a heightened degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents on the proprietor's premises. (*Id.* at p. 238; *Ann M., supra,* 6 Cal.4th at p. 679.) To hold otherwise, the Supreme Court said, would impose an unfair burden upon proprietors and, in effect, would force proprietors to become the insurers of public safety, contrary to well-established policy in this State. (*Ibid.*) By contrast, only "regular" reasonable foreseeability is required where there are strong policy reasons for preventing the harm or the harm can be prevented by simple means or by imposing minimal burdens. (*Delgado, supra,* 36 Cal.4th at pp. 237-238, 243 and fn. 24.)

The existence and scope of a proprietor's duty to protect against wrongful acts by third parties is a question of law for the court to resolve. (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213 (*Castaneda*).) A reviewing court determines de novo the existence and scope of the duty owed. (*Ann M., supra,* 6 Cal.4th at p. 674.) When analyzed to determine the existence or scope of a duty, foreseeability is also a question of law to be decided by the court. (*Delgado, supra*, 36 Cal.4th at p. 237.)

Here, Jones was a patron or invitee of the restaurant. Accordingly, the owner owed Jones a duty to take reasonable steps to secure the deck against foreseeable wrongful acts by third parties that were likely to occur in the absence of such precautionary measures. (*Delgado, supra,* 36 Cal.4th at p. 244.)

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69 Cal.2d 108, 112-113, superseded by statute in a different context as stated in *Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, 721-723.

A proprietor does not have a duty to provide security guards to protect patrons and invitees unless there is *heightened* foreseeability of the third-party misconduct. (*Delgado, supra,* 36 Cal.4th at p. 240; *Ann M., supra,* 6 Cal.4th at p. 679; *Sharon P. v. Arman, Ltd*. (1999) 21 Cal.4th 1181, 1195-1196 (*Sharon P.*), disapproved on other grounds in *Reid v. Google, Inc*., *supra,* 50 Cal.4th at p. 527, fn. 5 and *Aguilar, supra,* 25 Cal.4th at p. 853, fn. 19.) This is because such a requirement imposes significant monetary and social costs on the proprietor, and it is difficult to determine how much security is adequate to deter third-party misconduct. (*Delgado, supra,* 36 Cal.4th at p. 238; *Ann M., supra,* 6 Cal.4th at p. 679.)

Jones presented evidence that during the period from July 2003 through December 31, 2009, various criminal acts at the restaurant resulted in incident reports by the Mammoth Lakes Police Department. Among other things, those acts included assault (Pen. Code, § 240), assault with a deadly weapon or by any means likely to produce great bodily injury (Pen. Code, § 245), battery (Pen. Code, §§ 242, 243), burglary (Pen. Code, § 459), theft crimes (Pen. Code, §§ 487, 488, 496, 537), and vandalism (Pen. Code, § 594). Jones argues the reports of burglary, theft, assault, battery, and vandalism are similar to the misconduct in this case. We disagree. None of those prior reports would have alerted the owner to monitor the snow grate to prevent a patron from falling through it. (See *Delgado, supra,* 36 Cal.4th at pp. 231, 245; *Sharon P., supra,* 21 Cal.4th at pp. 1191, 1195; *Ann M., supra,* 6 Cal.4th at pp. 679-680; *Ericson v. Federal Express Corp*. (2008) 162 Cal.App.4th 1291, 1305-1307; *Alvarez v. Jacmar Pacific Pizza Corp*. (2002) 100 Cal.App.4th 1190, 1211-1212; *Jamison v. Mark C. Bloome Co.* (1980) 112 Cal.App.3d 570, 573-575, 579 (*Jamison*);[2] contra, *Tan v. Arnel Management Co*. (2009) 170 Cal.App.4th 1087, 1092, 1099-1101.)

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[2] The Supreme Court in *Isaacs v. Huntington Memorial Hosp*. (1985) 38 Cal.3d 112 disapproved the conclusion in *Jamison* that "in the absence of prior similar incidents, an

Jones presented no other evidence demonstrating heightened foreseeability that third parties would tamper with the snow grate at the restaurant, and the owner had no duty to post a security guard on the deck to deter third persons from tampering with the snow grate in the absence of prior similar incidents or other "sufficiently serious 'indications of a reasonably foreseeable risk' " of the harm. (*Castaneda, supra*, 41 Cal.4th at p. 1222.)

There is no admitted evidence in the record showing that installing a locking mechanism on the snow grate would have been minimally burdensome. But even if we assume a minimal burden, the circumstances do not establish "regular" reasonable foreseeability requiring such installation. Alexander and Brookings said although snow grates were common in Mammoth Lakes, they had never seen one in the area with a locking mechanism. LaFramboise did not say he had actually installed a locking mechanism on any snow grate or that any snow grate in Mammoth Lakes had a locking mechanism installed. In addition, Alexander, Brookings and Jones had never seen anyone move or remove the snow grate prior to the incident. Jones's limited partnerships did not install a locking mechanism on the snow grate or advise the owner of a need to do so. There is also no evidence of tampering with snow grates on nearby premises. Foreseeability is a " 'crucial factor' " in determining the scope of a proprietor's legal duty. (*Delgado, supra*, 36 Cal.4th at p. 237; *Ann M., supra*, 6 Cal.4th at p. 676.) Jones cannot prove that the third-party misconduct was foreseeable, and he does not argue that

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owner of land is not bound to anticipate the criminal activities of third persons, particularly where the wrongdoer was a complete stranger to both the landowner and the victim and where the criminal activity leading to the injury came about precipitously." (*Isaacs, supra*, 38 Cal.3d at p. 125.) The *Isaacs* Court said foreseeability must be "determined in light of all the circumstances and not by a rigid application of a mechanical 'prior similars' rule." (*Id.* at p. 126.) But the Supreme Court changed course in *Ann M., supra*, 6 Cal.4th 666, holding that in the absence of a prior similar incident a proprietor has no duty to provide security guards. (*Castaneda, supra*, 41 Cal.4th at p. 1226 (conc. & dis. opn. of Kennard, J.); *Wiener, supra*, 32 Cal.4th at pp. 1146-1147.)

consideration of the other *Rowland* factors requires imposing a duty upon the owner to protect against the injury Jones suffered.

Accordingly, Jones cannot demonstrate that the owner owed him a duty to undertake the preventative measures he proposes. Because Jones cannot prove a necessary element of his causes of action, the trial court did not err in granting the summary judgment motion.

II

Jones next claims the trial court erred in finding good cause to hear the summary judgment motion within 30 days of trial, and Jones had insufficient time to oppose the motion.

A

In his opposition to the summary judgment motion, Jones objected that the owner did not comply with notice requirements and he also opposed the motion on the merits. In reply, the owner's counsel argued, among other things, that Jones was not prejudiced by the timing of the motion, but in any event, the owner proposed a one or two day continuance of the hearing, or a continuance of the trial date, to address any claimed prejudice. The owner subsequently filed an ex parte application to continue the hearing.

The trial court heard the ex parte application on July 11, 2013, the original hearing date for the summary judgment motion. Jones argued at the hearing that there was no good cause to hear the summary judgment motion less than 30 days before trial because discovery had been completed for nearly a year, the owner could have brought the summary judgment motion earlier, and Jones suffered prejudice because he did not have enough time to present additional evidence in opposition to the summary judgment motion. Jones did not identify the additional evidence he wanted to present and did not request a continuance to present the evidence. Jones added that continuing the summary judgment hearing date would shorten the time for him to prepare for trial, but he did not request a continuance of the trial.

The trial court found good cause to hear the summary judgment motion within 30 days prior to trial. It determined that discovery had occurred within months of the hearing, and it ruled the matter needed to be heard on the merits. The trial court also found the amount of notice did not cause prejudice to Jones and that Jones filed an "excellent" opposition to the motion. The trial court continued the hearing on the summary judgment motion to July 15. At the continued hearing, counsel for Jones interposed further evidentiary objections and presented a lengthy argument on the objections and the merits.

B

The owner's motion for summary judgment was originally set to be heard on July 11, but the trial court continued the hearing to July 15, which put the hearing less than 30 days before the trial date. Jones argues there was no good cause to hear the summary judgment motion within 30 days of trial because discovery had been completed long before and the motion could have been brought much earlier. Jones says the declarations filed by the parties, the time required to prepare for pretrial submissions, and participation in a mandatory settlement conference did not supply good cause.

A summary judgment motion shall be heard no later than 30 days before the date of trial unless the court for good cause orders otherwise. (Code Civ. Proc., § 437c, subd. (a)(3).) We review the trial court's rulings on notice issues for an abuse of discretion. (*Armato v. Baden* (1999) 71 Cal.App.4th 885, 899; *Mann v. Columbia Pictures, Inc*. (1982) 128 Cal.App.3d 628, 632-633.) " 'An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice. [Citations.] This standard of review affords considerable deference to the trial court provided that the court acted in accordance with the governing rules of law. We presume that the court properly applied the law and acted within its discretion unless the appellant

affirmatively shows otherwise. [Citations.]' " (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1413.)

The trial court found discovery was ongoing up through April 2013, the month when the owner filed its summary judgment motion. Substantial evidence supports that finding. Plaintiff took the deposition of Alexander on March 29, 2013. The owner's summary judgment is based in part on Alexander's deposition testimony. It appears a document relating to the Mono County Sheriff's Department and showing an 11:42 p.m. bar check at the restaurant was an exhibit to that deposition. The owner also relied on that document to argue it was not foreseeable to the owner that third parties would tamper with the subject snow grate.

Jones also claims he had insufficient time to oppose the summary judgment motion. Notice of a motion for summary judgment and supporting papers must be served at least 75 days before the time appointed for hearing. (Code Civ. Proc., § 437c, subd. (a)(2).) If the notice is served by overnight delivery, the required 75-day period of notice is increased by two court days. (*Ibid*.) The owner filed the summary judgment motion on April 26 and set the matter for hearing on July 11, two court days short of the required notice period. But the trial court subsequently continued the hearing by two court days to July 15.

The trial court found the notice period did not result in prejudice to Jones. That finding is supported by the record. Jones received 76 days notice of the owner's motion. Counsel for Jones opposed the owner's motion on procedural and substantive grounds. He presented a number of supporting declarations and lengthy argument at the hearing, and he interposed numerous evidentiary objections. Counsel for Jones said he would have been able to present additional evidence in opposition to the owner's summary judgment motion if the owner had timely filed the motion, but he did not identify what additional evidence he would have presented. The trial court did not abuse its discretion,

and Jones cannot establish reversible error. (*Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 493, fn. 4 [party claiming error must demonstrate reversible error].)

III

Jones also contends the trial court erred in sustaining the owner's objection to paragraph 3 of the Gerry LaFramboise declaration.

LaFramboise averred in paragraph 3 of his declaration that a locking mechanism for any snow grate would be fairly simple to install. He estimated a locking mechanism could be installed on a metal snow grate that was approximately 5 feet by 3 feet in size by adding "a couple of lag bolts and/or big screws," at a cost of $75 in labor and materials.

We will not reverse a judgment by reason of the erroneous exclusion of evidence unless it appears, upon examining the entire cause, that a miscarriage of justice has resulted. (Cal. Const., art. VI, § 13; Evid. Code, § 354; Code Civ. Proc., § 475; *California Crane School, Inc. v. National Com. for Certification of Crane Operators* (2014) 226 Cal.App.4th 12, 24; *Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc*. (2014) 225 Cal.App.4th 786, 799.) A miscarriage of justice exists only when the reviewing court is convinced it is reasonably probable a result more favorable to the appellant would have been reached absent the error. (*California Crane, supra*, 226 Cal.App.4th at p. 24; *Grail, supra*, 225 Cal.App.4th at p. 799.) The appellant bears the burden of establishing that the error requires reversal. (*Grail, supra*, 225 Cal.App.4th at p. 799.)

Jones has not established a miscarriage of justice. Even if the averments in paragraph 3 of the LaFramboise declaration had been admitted, it would not change our conclusion that the owner did not have a duty to take preventative measures. The LaFramboise declaration addressed the burden to lock the grate, but it did not address foreseeability. As we have explained, it was not reasonably foreseeable that third parties would remove the snow grate and cause a patron to fall through the deck opening. Accordingly, it is not reasonably probable Jones would have prevailed on the summary

judgment motion if the trial court had not excluded the averments in paragraph 3 of the LaFramboise declaration.

DISPOSITION

The judgment is affirmed.

/S/
MAURO, J.

We concur:

/S/
BUTZ, Acting P. J.

/S/
MURRAY, J.